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NO. _____

In The
SUPREME COURT OF THE UNITED STATES

ELRADER BROWNING, JR.,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether, before a jury may conclude under 21 U.S.C. § 848 that the defendant was an organizer, supervisor or manager of five or more individuals in a continuing criminal enterprise, the jury must be informed that they have to unanimously agree on the five or more persons the defendant organizer, supervised, or managed?

(2) Whether, before a jury may conclude under 21 U.S.C. § 848 that the defendant was an organizer, supervisor, or manager of a continuing criminal enterprise, the jury must be informed whether certain individuals, listed in the indictment, do not legally qualify as individuals that have been organized, supervised or managed by the defendant?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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OPINIONS BELOW

On July 11, 2003, by Memorandum, the United States Court of Appeals for the Ninth Circuit affirmed the denial of Petitioner's 28 U.S.C. §2255 motion, which appears in Appendix A to this Petition, and on September 18, 2003, the United States Court of Appeals for the Ninth Circuit denied Petitioner's timely petition for panel rehearing, which appears in Appendix B to the Petition.

On March 29, 2001, United States District Judge Stephen Wilson, in a Memorandum and Order, agreed that Petitioner could not be sentenced for violations of 21 U.S.C. §§ 846 and 848, where the underlying conduct forming the basis of the conspiracy and Continuing Criminal Enterprise (CCE) charges was the same (CR[1] 2121: 3-4, 32; ER 91-92, 120), but otherwise denied Petitioner's *pro se* §2255 motion in its entirety. CR: 2121: 2-3, 32; ER 90-91, 120. The court then vacated Petitioner's conviction and sentence under Section 846 (Count 1) on the condition that his conviction and sentence on Count 1 would be reinstated should Petitioner be successful in having his CCE conviction and sentence vacated, which appears in Appendix C to this Petition. CR: 2121: 3-4, 32; ER 91-92, 120. On July 10, 2001, the district court entered its order granting a certificate of appealability on Petitioner's claim that the court erred in failing to instruct

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[1] "CR" refers to the clerk's record in the underlying criminal case, D.C. No. CR 87-571-SVW, in which most but not all of the relevant pleadings were docketed and "CV 97-2701 CR" refers to the clerk's record under the civil number assigned to Petitioner's 2255 motion. "ER" refers to the Excerpts of Record. "RT" refers to the reporter's transcript at Petitioner's trial.

the jury that it must unanimously agree on the five supervisees, but denied Petitioner's Application for Certificate of Appealability on the remaining issues proposed by Petitioner, which appears in Appendix D to this Petition. CV 97-2701 CR 10; ER 122-123. As relevant here, on October 22, 2001, the United States Court of Appeals for the Ninth Circuit granted Petitioner's motion for a broader certificate of appealability with respect to another issue, whether the district court erred in failing to instruct the jury that it could consider as supervisees only those persons over whom petitioner exercised managerial authority, which appears in Appendix E to this Petition. ER 124.

BASIS OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit denied Petitioner's appeal from the denial of this 28 U.S.C. §2255 motion, and his petition for panel rehearing on September 18, 2003. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth and Sixth Amendments; 21 U.S.C. § 848; and 28 U.S.C. § 2255; all set forth in Appendix F.

STATEMENT OF THE CASE AND FACTS

Here, the United States Court of Appeals for the Ninth Circuit, concluded that in a CCE prosecution, under 21 U.S.C § 848 (b), the jury did not have to be instructed that it had to

unanimously agree on the five supervisees nor did the jury have to be instructed that it could only consider as supervisees those persons over whom Petitioner exercised managerial authority, because the prosecutor did not argue to the jury that any individual that could not be found to be a supervisee was in fact a supervisee, even though the indictment allowed the jury to conclude that individuals that Petitioner did not exercise managerial authority over could be found by the jury to be supervisees.

In the fourth superseding indictment, Petitioner was charged with conspiring to distribute cocaine, cocaine base, and heroin, in violation of 21 U.S.C. §§846 and 841 (Count One), with numerous counts of distributing and possessing with intent to distribute controlled substances (Counts 2-10, 12, 14-17, 19, 21-37, 39-43), with one count of attempted distribution (Count 38), with several counts of narcotics-related money laundering (Counts 11, 18, 20), with one count of a firearm violation (Count 45) and with being a principal administrator of a CCE, in violation of 21 U.S.C. §848(b) (Count Forty-four). CR 245; ER 2-15, 58-59.

Count Forty-four alleged that Petitioner undertook the predicate offenses of the CCE ". . . in concert with five or more persons with respect to whom defendant . . . occupied a position of organizer, supervisor and manager, which persons included, but were not limited to, Rodney Browning, Nei Wells, Gregory Washington, James Carpenter, Terri Justin, John Milan, Carolyn Henderson, Bridgette Bradford, Steven Bragg, Kimberly Gilmer, James Jenkins, Rodney Nelson aka Sky, Gregory Hughes, Louis Cunningham aka L.C., and Rachel (LNU) . . . ." It incorporated the conspiracy count (Count one), the possession with intent to distribute and

distribution counts (Counts 2-10, 12, 14-17, 19, 21-37, 39-43), and the attempted distribution count (Count 38), as the predicate offenses.[2/] The jury had the indictment, signed off on by the Chief of the Criminal Division of United States Attorney's Office, with it during deliberations. RT 6/9/89 p. 33. While the Ninth Circuit in reaching its result relied on the prosecutor's failure to specifically mention some individuals as being supervisees during jury argument, the jury was instructed that statements of the attorneys were not evidence. RT 6/9/89 p. 34.

Petitioner represented himself at trial, although advisory counsel was appointed to assist him. CR 100, 127. Petitioner was ultimately convicted of all charges and sentenced to life imprisonment without possibility of parole. CR 542, 633; ER 65. On August 6, 1990, the United States Court of Appeals for the Ninth Circuit affirmed Petitioner's conviction in an unpublished disposition in *United States v. Washington*, 909 F.2d 1490 (9th Cir. 1990)(Table). A petition for writ of certiorari was denied by this Court on April 22, 1991. *Cameron v. United States*, 499 U.S. 977, 111 S.Ct. 1625 (1991).

On April 18, 1997, Petitioner filed his pro se motion to vacate, set aside or correct sentence ("§2255 motion") pursuant to 28 U.S.C. §2255 (CR 2017; ER 66-88), asserting

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[2/] It should be noted that while Petitioner was convicted on each of the incorporated counts, the substantive counts were submitted to the jury on an aiding and abetting theory. RT 6/9/89 pp. 49-50. The jury was not specifically told it could not rely on an aiding and abetting theory in reaching its verdict on Count 44.

three grounds for relief: (1) That his cumulative sentences under 21 U.S.C. Section 846 and 21 U.S.C. Section 848 violated the Double Jeopardy Clause; (2) That the Court erred in failing to instruct the jury that it must unanimously agree on the five people Petitioner supervised, to convict on the CCE count; and (3) That the Court erred in failing to instruct the jury it could consider as supervisees only those persons over whom Petitioner exercised managerial authority.

On March 29, 2001, the district court agreed with Petitioner on the first issue (cumulative sentences), (CR: 2121: 3-4, 32; ER 91-92, 120; App. C pp. C-3 - C-4, C-33), but otherwise denied Petitioner's pro se §2255 motion in its entirety. On July 11, 2003, the United States Court of Appeals for the Ninth Circuit affirmed the denial of his §2255 motion on the grounds that the prosecutor did not specifically ask the jury to find anyone that could not legally be a supervisee was in fact a supervisee of Petitioner's. App. A p. A-2.

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted to Determine Whether the Jury must Unanimously Agree On Five Supervisees in a CCE Prosecution.

Petitioner, Elrader Browning, Jr., respectfully prays that a Writ of Certiorari issue to determine whether a jury must unanimously agree on the identity of the five persons a defendant is found to have organized, supervised or managed, and whether the jury must be informed when certain individuals named in the indictment could not, as a matter of law, have been organized, supervised or managed, by the defendant, in a prosecution under 21 U.S.C. § 848. These

questions were left open in *Richardson v. United States*, 526 U.S. 813, 824;[3/] 119 S. Ct. 1707, 1713 (1999) and the Circuits are split on the proper interpretation of the statute. (Compare, *United States v. Jerome*, 942 F.2d 1328 (9th Cir. 1991), requiring agreement on five specific individuals and traditional understanding of organized, supervised or managed; with *United States v. Hall*, 93 F.3d 126, 130 (4th Cir. 1996), *United States v. Broussard*, 80 F.3d 1025, 1038 (5th Cir. 1996), and *United States v. Rockelman*, 49 F.3d 418, 421 (8th Cir. 1995), no requirement for jury to agree on five specific individuals.)

At the close of the evidence, Petitioner requested that the court instruct the jury that it must unanimously agree on the identity of at least five supervisees and that, in the event of a conviction on Count 44, the jury must complete a special verdict form identifying five or more persons whom the jury unanimously found to be supervised by Petitioner. The district court declined such a jury instruction or special

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[3/] "Second, the Government points to a different portion of the statute, which requires a defendant to have supervised "five or more other persons." 21 U.S.C. § 848(c)(2)(A). The Government says that no one claims that the jury must unanimously agree about the identity of those five other persons. It adds that the jury may also disagree about the brute facts that make up other statutory elements such as the "substantial income" that the defendant must derive from the enterprise, § 848(c)(2)(B), or the defendant's role in the criminal organization, § 848(c)(2)(A). Assuming, without deciding, that there is no unanimity requirement in respect to these other provisions, we nonetheless find them significantly different from the provision before us. They differ in respect to language, breadth, tradition, and the other factors we have discussed."

verdict form. 6/8/88 RT 102; 6/9/88 RT 13-19, 26-27; Exhibit 7 to Opposition to Petitioner's Section 2255 Motion; Exhibit to Section 2255 Motion; ER 125B, 134-142. However, the indictment, incorporating various counts, and therefore various individuals, into Count 44 was sent to the jury during deliberations. RT 6/9/89 p. 33. Therefore, the jury had to be aware that Count 44 alleged that Petitioner had supervised individuals named in other counts that the evidence at trial established Petitioner could not have "supervised." Finally, the jury was instructed that statements of the attorneys were not evidence. RT 6/9/89 p. 34.

Prior to Petitioner's trial, this Court had decided *California v. Trombetta*, 467 U.S. 479, 81 L. Ed. 2d 413, 104 S. Ct. 2528 (1984) and *Crane v. Kentucky*, 476 U.S. 683, 690, 90 L. Ed. 2d 636, 106 S. Ct. 2142 (1986) (quoting *California v. Trombetta*, *supra*, 467 U.S. at p. 485, ("'he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'")). Thus, Petitioner had a Fifth Amendment due process right to a fair trial and a Sixth Amendment right to present a defense, which included a jury instruction on his theory of defense. Moreover, the prosecution was required to prove each element of the 21 U.S.C. § 848 charge beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970). Prior to Petitioner's trial, the United States Court of Appeals for the Ninth Circuit required a jury unanimity instruction, much like that sought here, in a similar situation. Cf. *United States v. Echeverry*, 719 F.2d 974 (9th Cir. 1983).

After Petitioner's trial, in *United States v. Jerome*, 942 F.2d 1328 (9th Cir. 1991), the United States Court of Appeals for the Ninth Circuit held that it was plain error for the district

court to fail to give the jury a specific unanimity instruction in a CCE prosecution if the jury was presented with a variety of persons that the prosecution stated could count in making up the five persons necessary to trigger the CCE statute, but some of those persons could not have been organized by the defendant. Jurors had to unanimously agree as to the identity of the five people the defendant organized, managed, or supervised. Id. at 1331; *see also United States v. Fuchs*, 218 F.3d 957, 963 (9th Cir. 2000); *United States v. Otis*, 127 F.3d 829, 834-35 (9th Cir. 1997).

Relying on *United States v. Delgado*, 4 F.3d 780 (9th Cir. 1993), Petitioner contended in his §2255 motion that several of the individuals named in the indictment did not meet the legal definition of a supervisee. CR 2030: 1-12, Reply/Amended motion, pp.1-12. *Delgado* established that a drug seller does not organize drug customers, even wholesaler customers, any more than drug buyers organize or manage drug suppliers. *Id.* at 786.

Appellee, in its Opposition to Petitioner's June 27, 1997 Reply/Amended motion (CR 2102: 21), argued that the evidence overwhelmingly supported a finding that Petitioner directly supervised some, but not all, of the individuals listed in Count 44, and indirectly supervised three of the listed individuals.[4/] Appellee, however, appeared to tacitly concede

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[4/] Appellee listed Nei Wells, Gregory Washington, James Carpenter, Terri Justin, Bridgette Bradford, Kimberly Gilmer, James Jenkins, Rodney Nelson, Gregory Hughes, and Louis Cunningham as direct supervisees, and Terri Justin, Stephen Bragg and Rachel (LNU) as being indirectly supervised through Nei Wells.

that two of the fifteen named individuals were not under Petitioner's supervision; Rodney Browning[5/] and Carolyn Henderson. Thus, even under the government's theory, without the special verdict or specific unanimity instruction requested, the jury was given the opportunity to incorrectly find that Petitioner had a supervisory role over an individual where the evidence at trial was to the contrary.

Count 44 incorporated Counts 1-10, 12-17, 19, and 21-43. Count 1, the conspiracy count, alleged Petitioner conspired with, among others, George Cameron, James Holiday, and Edward McFadden. It was alleged in ¶¶'s 2 and 3 that Edward McFadden and George Cameron supplied cocaine and heroin to Petitioner; in ¶ 5 that Alfred Calvert distributed cocaine for Petitioner in Detroit, Michigan; in ¶ 6 that James Holiday and William Packer distributed cocaine for Petitioner in Hollywood, California; and in ¶ 12 that Joseph Woodson distributed cocaine for Petitioner in Palm Springs, California. Further, Count 44 alleged that Petitioner, in concert with five or more persons, "occupied a position of organizer, supervisor and manager, which persons included, **but were not limited to**," the fifteen listed individuals.

[5/] While the court below concluded the evidence was sufficient to establish Petitioner supervised Rodney Browning (CR 2121: 6-8), the court relied only on a passage during direct examination, it did not look to limitations on that testimony developed on cross examination. (*See* 6/3/88 RT at pp. 74, 86, 91-92) Isolated bits of testimony do not constitute substantial evidence to uphold a conviction. (*Cf. People v. Johnson*, 26 Cal.3d 557, 576-77 (1980); *see also Jackson v. Virginia,* 443 U.S. 307, 316, 318-19 (1979).

With the supervisees not being limited to the individuals delineated in Count 44, the jurors were encouraged to find that customers named in Count 1, such as Alfred Calvert, James Holiday. William Packer, and Joseph Woodson, were also supervised by Petitioner because of the allegation that they sold cocaine for Petitioner in various cities. Further, the jury could have concluded that Edward McFadden and George Cameron were also supervised by Petitioner even though they were Petitioner's suppliers.

Consequently, as Petitioner was convicted of Count 1, and also of Counts 2-10, 12-17, 19, and 21-43, and these counts were incorporated into Count 44, there is no assurance that the jury restricted itself only to the persons specifically alleged to have been supervisees in Count 44. The indictment expressly stated that potential supervisees were not limited to the people specifically listed in the CCE count. Even among the listed individuals, several were proven only to be suppliers and customers (as set forth above), and were, therefore, not supervised by Petitioner as a matter of law. As the United States Court of Appeals for the Ninth Circuit explained in *United States v. Delgado*, *supra*, 4 F.3d at pp. 785-786:

> "The evidence was uncontradicted that Delgado sold cocaine to Fernandez and Fajardo but did not in any sense manage the conduct of their own criminal business. We must therefore conclude that Delgado did not "occup[y] a position of organizer, or supervisory position, or any other position of management," 21 U.S.C. §848(c)(2)(A), with respect to Fernandez and Fajardo. In ordinary business usage, selling to people does not make one an organizer of

customers. Even wholesale customers, any more than buying from them makes one an organizer of suppliers. *Cf. Jerome* at 1331."

Therefore, it is impossible to tell if the jury's finding with respect to supervisees, over whom Petitioner exercises managerial authority, included drug suppliers and customers. While the district court understood that the jury could be confused by this evidence, the district court incorrectly followed the prosecutor's lead and ultimately did not inform the jurors that they had to agree on the five people Petitioner supervised. *See e.g.*, RT 6/9/88: 15-16, ER 136-37 [6]

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[6]

"MR. BURDA: . . . The request would be that the jury enumerate who the five or more persons were. There are many persons to choose from. Our concern, of course, is a question of unanimity.

THE COURT: You mean you're saying that the jury would have to agree on the same five people?

MR. BURDA: Seems to me it would.

MR. GORDON: Your Honor, I'm sorry to interrupt. I think there's a case directly on point on that that says they do not have to agree unanimously on which five people they are as long as they find five or more people. I would have to run up and get – check the U.S. Code Annotated, because I recall seeing something along those lines.

If Your Honor wants to put in a

special verdict form, I think it should be: You must unanimously find – well, you must unanimously find all the elements, but you must find that he acted as organizer, supervisor, manager of the five or more other persons that he committed the offenses with, not that they have to say exactly which ones each juror agrees was supervising.

THE COURT: You must unanimously agree on the five - on five - that he supervised five or more people.

MR. GORDON: Right, that he did supervise five or more people, not exactly which ones they were.

THE COURT: Of course, that could mean that the jury – what if the jury unanimously agrees that he supervised - I'll just pick some names - Justin, Carolyn - what was her name

MR. GORDON: Henderson

THE COURT: Henderson, Nei Wells, and -

MR. GORDON: Steven Bragg.

THE COURT: Steven Bragg and this Gregory, and let's say there were a couple of others, Hughes, Rodney Browning, Ford, some others. The jury could agree that there were five or more people that he supervised but not agree on which ones.

Thus, not only were there individuals named in Count 44 that the jury could only have incorrectly considered as being supervised by Petitioner, the problem was compounded by the incorporation by reference of other counts and other individuals who could not have been supervised by Petitioner as a matter of law. The court's failure to instruct the jury that they had to unanimously agree on the five specific individuals that Petitioner supervised has made it impossible to tell if the verdict reached by the jury was supported by the evidence. Therefore, Petitioner's §2255 motion was improperly denied. His conviction for the CCE, alleged in Count 44, should be vacated.

> In other words, maybe, as an example, Juror No. 10 believed that he supervised five or more and in her five they were, you know, "A" through "E", and then Juror No. 12 also believed that he supervised five or more, but in her five it was "A" through "D" and "F". I've always been a little unsure of that requirement. Why don't you take a look and see that the -
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> MR. GORDON: Okay
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> THE COURT: Law says on that
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> MR. GORDON: All right
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> THE COURT: Because this is a very serious charge and there ought not be any doubt."

The United States Court of Appeals for the Ninth Circuit erroneously concluded that the unanimity instruction was only required if the prosecutor affirmatively argued to the jury that an individual was a supervisee, citing *United States v. LeMaux*, 994 F.2d 684, 688 (9th Cir. 1993). There, however, the Ninth Circuit did not discuss the language in that CCE allegation nor did it state whether that CCE count incorporated other counts into it, as was done here. There, after the Ninth Circuit set forth seven series of transactions involving various participants and discussed the prosecutor's closing argument, where 11 individuals were identified as supervisees and seven predicate acts, set forth in the indictment, were discussed, it summarized the holding in *United States v. Jerome, supra*, as follows:

> "*Jerome* is inapposite. Though the holding in *Jerome* required a unanimity instruction for supervisees, it is expressly limited to a situation where some of the supervisees, **presented as such by the government to the jury**, could not legally have been supervisees. *Id.* at 1331. Each of those identified by the government as possible supervisees here were eligible." (Emphasis added.) *United States v. Lemaux, supra,* 994 F.2d at p. 688.

However, the Ninth Circuit, in *Jerome* did not define what it meant by use of the term "presented." Here, the indictment, by its language incorporating allegations into the CCE count, "presented" individuals that could not be supervisees to the jury as potential supervisees. When closely examined, *LeMaux* supports Petitioner's argument.

The *LeMaux* Court relied upon *United States v. Jerome*, *supra*, where the Ninth Circuit held that it was plain error for the district court to fail to give the jury a specific unanimity instruction in a CCE prosecution if the jury was **presented** with a variety of persons that the prosecution stated could count in making up the five persons necessary to trigger the CCE statute, but some of those persons could not have been organized by the defendant, because the jurors had to unanimously agree as to the identity of the five people the defendant organized, managed, or supervised. *United States v. Jerome*, *supra*, 942 F.2d at 1331.[7] Here, the government also "presented" all individuals listed in the incorporated counts as supervisees because the government (by the Chief of the Criminal Division of the United states Attorney's Office) signed off on the fourth superseding indictment; the indictment was provided to the jury during deliberations; and the jury's task was to determine whether the allegations in the indictment had been proven beyond a reasonable doubt, to conclude whether Petitioner was guilty of the conduct alleged in Count 44.

For these reasons the United States Court of Appeals for the Ninth Circuit was incorrect in its assertion that listing individual in the indictment does not "present" them to the jury as potential supervisees. *LeMaux* certainly does not hold otherwise. When it is remembered that the jury here was also instructed that counsel's statements and argument were not

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[7] "The jury in this case was presented with a variety of persons that the prosecution told them could count in making up the five persons necessary to trigger the statute. However, some of the people named by the prosecution could not have been organized by Jerome."

evidence, the indictment must be viewed as the government's official version of what happened. Count 44 by its very terms, did not limit the supervisees to those individuals listed in Count 44. Instead, it alleged Petitioner occupied a position as an organizer, supervisor and manager of five or more individuals, including, but was not limited to, the 15 named individuals. Had the prosecution not intended to include the individuals named in the other counts as supervisees, it would merely have omitted the language "included, but not limited to" from Count 44. The prosecution's failure to do so, when it drafted this language, refutes the conclusion of the United States Court of Appeals for the Ninth Circuit.

Simply put, the government, through the indictment it drafted, clearly "presented" all individuals named in the counts incorporated into Count 44, as supervisees to the jury. *Cf. Ex Parte Bain*, 121 U.S. 1, 13;[8/] 7 S. Ct. 781, 788 (1887), *overruled on other grounds*, *United States v. Cotton*, 535 U.S. 625, 631; 122 S.Ct. 1781, 1785 (2001). Therefore, under the facts of this case, where the indictment presented many individuals as potential supervisees that could not be supervisees as a matter of law, and the jury was voting on the truth of the allegations in the indictment, not government counsel's final argument, it was prejudicial error to not give the jury an unanimity instruction.

[8/] "[I]f it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists." (Emphasis added.)

The flaw in the United States Court of Appeals for the Ninth Circuit's argument is easy to identify. That argument, in essence, concludes that no matter what the indictment alleges, and no matter what proof is offered in support of the indictment, statements of government counsel can "sanitize" language in the indictment and "override" proof offered at trial. This is not, and has not, been the law. Statements of counsel are simply not evidence (*United States v. Parker*, 241 F.3d 1114, 1120 (9th Cir. 2001); and *United States v. Sayakhom*, 186 F.3d 928, 946 (9th Cir. 1999)) and the jury here was so instructed. Moreover, neither statements nor arguments of counsel can be substitute for instructions by the court. *Taylor v. Kentucky*, 436 U.S. 478, 488-489;[2/] 98 S. Ct. 1930, 1936 (1978).

Certiorari should be granted to determine whether the jury unanimity instruction was required in this factual situation.

II. The Court Erred in Failing to Instruct the Jury that it Could Consider as Supervisees Only Those Persons over Whom Petitioner Exercised Managerial Authority.

Closely related to the district court's failure to instruct on the unanimity issue, the district court also did not instruct the jury that individuals qualify as supervisees only if they were those over whom Browning exercised managerial responsibility. The jury was presented with evidence that Petitioner Browning was the head of an organization and as head of that organization dealt with George Cameron, Edward McFadden, Alfred Calvert, James Holiday, William Packer,

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[2/] "But arguments of counsel cannot substitute for instructions by the court."

and Joseph Woodson, who were either suppliers or customers of the organization. No cautionary instruction explained to the jury that these individuals could not be included within the required five supervisees required for the CCE conviction. In *United States v. Barona*, 56 F.3d 1087, 1097 (9th Cir. 1995) the United States Court of Appeals for the Ninth Circuit held:

> "The jury was not instructed, however, that individuals qualify as supervisees only if they were those over whom Villabona or Bennett exercised managerial responsibility. It is true that the jury received an instruction that followed the language of section §848(c)(2)(A)-- but our interpretation of that statute was not made clear until *Delgado* decided the issue, and *Delgado* was decided after the jury was instructed. If certain individuals were, as a matter of law, incapable of counting as supervisee, the jury needed to be instructed of this." (Emphasis added)

Accordingly, as noted above, it is impossible to tell whether the jury selected as one or more of the purported supervised individuals, Cameron, McFadden, Calvert, Holiday, Packer, or Woodson, who were ineligible under *Delgado* to be supervisees. Consequently, the district court erred in failing to instruct the jury that none of these six individuals could be considered as a supervisee when the jury was determining whether Petitioner in fact supervised five or more individuals, as required by *Delgado* and *Barona*.

The district court did not instruct the jury that individuals qualified as supervisees only if they were those over whom Browning exercised managerial responsibility, even though the jury heard evidence that Petitioner, as head of an

organization, dealt with George Cameron, Edward McFadden, Alfred Calvert, James Holiday, William Packer, and Joseph Woodson, who were either suppliers or customers of that organization. No cautionary instruction explained to the jury that these individuals could not be included within the five supervisees required for the continuing criminal enterprise conviction, even though their names were incorporated in the CCE allegation.[10/] The United States Court of Appeals for the Ninth Circuit concluded that was permissible because the government, in argument to the jury, properly distinguished between potential supervisees and mere suppliers and purchasers, so the instruction was not necessary, relying on *United States v. Barona, supra*, 56 F.3d at p. 1097. (App. A. p. A-2.)

While the government did not affirmatively ask the jury, in its argument, to conclude that any of these individuals were supervisees, the indictment itself did so ask by the language incorporating other counts into Count 44 and by not limiting individuals that were "managed" to those named in Count 44. When the indictment was provided to the jury during deliberations, it "presented" the above named individuals as

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[10/] In its Order denying Petitioner's §2255 motion, the district court recognized that the *Delgado* instruction should have been given, but found that since Petitioner did not object at trial or on appeal, he could not demonstrate cause and prejudice. And even if he could show cause based on the ineffectiveness of appellate counsel, he could not show actual prejudice. (CR 2121: 4-9, March 29, 2001 Order denying §2255 motion, pp. 4-9.; App. C pp. C-4 - C-9) Petitioner's argument that this conclusion was incorrect was not reached by the United States Court of Appeals for the Ninth Circuit. (App. A p. A-2.)

individuals that the jury could find were "managed" by Petitioner. *See Ex Parte Bain, supra*, 121 U.S. at p. 13.

United States v. Barona, supra, relied upon by the Ninth Circuit, does not support a contrary position. In *Barona* the Ninth Circuit did not disclose the language used in the CCE counts there, but it does mention a "list" of supervisees, without disclosing whether this "list" was included in the CCE counts in question. Here, however, the government signed off on this indictment that incorporated other counts into Count 44 and specifically said that the list of persons managed "included, but was not limited to" 15 listed individuals in Count 44. Contrary to the conclusion of the Ninth Circuit, this clearly "presented" the suppliers and customers as individuals that the jury had to decide whether or not Petitioner "managed." However, as in *Barona*, "There were no instructions directing the jury to exclude one who is only a customer. Lacking some assurance that proper differentiation could be made, the verdicts on Counts 27 and 28 must be reversed." *United States v. Barona, supra*, 56 F.3d at p. 1098. The prosecutor's argument to the jury, failing to mention some individuals named in the indictment, cannot be substituted for instructions by the court. *See Taylor v. Kentucky*, supra, 436 U.S. at pp. 488-489.

Certiorari should be granted to determine whether the court was required to inform the jurors that certain individuals, as a matter of law, could not be included in the five supervisees necessary for a conviction on Court 44.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Ninth Circuit, effectively denying Petitioner his right to a jury verdict on whether he supervised five or more individuals as required under Court 44. This Petition for Writ of Certiorari presents important questions impacting Petitioner's rights to due process, a fair trial, and his right to present a defense, under the Fifth and Sixth Amendments to the Constitution. Certiorari should be granted to resolve these important questions.

Dated: December 15, 2003

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 01-56161

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

ELRADER BROWNING, JR., Defendant-Appellant.

D.C. No. CV-97-02701-SVW
CR-87-00571-SVW-1

MEMORANDUM*

Entered July 11, 2003

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted July 7, 2003**
Pasadena, California

Before: SILVERMAN, W. FLETCHER, and RAWLINSON, Circuit Judges.

1. The requirement that the district court provide a unanimity instruction in a continuing criminal enterprise case is "expressly limited to a situation where some of the supervisees, presented as such by the government to the jury, could not legally have been supervisees." *United States v. LeMaux*, 994 F.2d 684, 688 (9th Cir. 1993) (citation omitted). Therefore, even if Elrader Browning's claim was not procedurally defaulted, no unanimity instruction was required in this case, since the government did not present any non-supervisees to the jury. Listing individuals in the indictment is not the same as presenting them to the jury. *See id.*

2. Similarly, irrespective of Browning's potential procedural default, the government properly distinguished between potential supervisees and mere suppliers and purchasers of narcotics, negating any need for a managerial authority instruction. *See United States v. Barona*, 56 F.3d 1087, 1097 (9th Cir. 1995).

3. Since Browning's ineffective assistance of appellate counsel claims fail on the merits, we need not address whether the district court erred in denying the motion to amend the petition to include those claims. Counsel's failure to propose jury instructions clarifying that Browning and his supervisees must simultaneously act in a conspiratorial manner is consistent with our ruling in *United States v. Jerome*, 942 F.3d 1328, 1330 (9th Cir. 1991), and therefore objectively reasonable. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984). In any event, Browning cannot show that the outcome of the trial would have differed. *Id.* at 694.

4. Counsel's failure to challenge the district court's use of the term "together" in lieu of "in concert" in the jury instructions was not objectively unreasonable, since "the

words and phrases in the CCE statute are neither outside the common understanding of a juror, nor so technical or ambiguous as to require a specific definition." *See United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1571 (9th Cir. 1989) (citation and alteration omitted).

5. Counsel's failure to demand jury unanimity as to each violation constituting the "continuing series of violations" as required by *Richardson v. United States*, 526 U.S. 813 (1999), do not have "a substantial and injurious effect or influence in determining the jury's verdict." *United States v. Montalvo*, 2003 WL 21309107 at *5 (9th Cir. June 9, 2003) (citation omitted).

6. Browning's contention that his counsel should have argued that Title 21 conspiracies may not serve as predicate offenses for CCE convictions is foreclosed by our decision in *Hernandez-Escarsega*, 886 F.2d at 1571.

7. The district court determined that the claims asserted by Browning's co-defendant's were without merit. As a result, even if Browning did not procedurally default these claims, the district court properly rejected Browning's motion to amend to add these rejected claims to his original petition.

AFFIRMED.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 01-56161

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

ELRADER BROWNING, JR., Defendant-Appellant.

D.C. No. CV-97-02701-SVW
CR-87-00571-SVW-1

Entered September 18, 2003

ORDER

Before: SILVERMAN, W. FLETCHER, and RAWLINSON, Circuit Judges,

Appellant Browning's Petition for Panel Rehearing is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ELRADER BROWNING, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

CV-97-02701-SVW
CR-87-00571-SVW

Entered March 29,2001

ORDER DENYING PETITIONERS MOTION UNDER 28 U.S.C. SECTION 2255 TO VACATE, SET ASIDE OR CORRECT HIS SENTENCE

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

I. Background

In 1987, petitioner, Elrader Browning ("Browning," "petitioner" or "defendant"), was charged with conspiring to distribute cocaine, cocaine base, and heroin in violation of 21 U.S.C. Sections 846 and 841 (Count 1), and with being a principal administrator of a continuing criminal conspiracy

("CCE") in violation of 21 U.S.C. Section 848(b) (Count 44). The fourth superseding indictment also charged Browning with numerous counts of distributing and possessing with intent to distribute narcotics, and several counts of narcotics-related money laundering.

Browning represented himself at trial, although advisory counsel was appointed to assist him. Nei Wells, previously Browning's girlfriend and business partner, was the government's key witness. Browning was ultimately convicted on all charges.

Browning hired counsel to represent him on appeal and brought challenges to both his convictions and sentence. Browning argued that the Court erred by denying his motion to suppress evidence gathered by means of warrant-authorized wiretaps and that sentencing him under the current versions of 21 U.S.C. Sections 848(b)(1) and 841(b)(1)(B) constituted an ex post facto application of the law. The Ninth Circuit rejected Browning's claims and affirmed his convictions.

II. Browning's Current Claims

On April 18, 1997, Petitioner filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. section 2255. Browning's original petition stated three claims: (1) that his cumulative sentences under 21 U.S.C. section and 21 U.S.C. section 848 violated the Double Jeopardy Claus; (2) that the Court erred in failing to instruct the jury that it must unanimously agree on the five people petitioner supervised to convict on the CCE count; and (3) that the Court erred in failing to instruct that the jury could consider as supervisees only those persons over whom Browning exercised

managerial authority. The government filed its opposition on May 12, 1997.

Subsequent to the filing of the government's opposition, petitioner has made four motions to amend to add additional claims to his petition. In Browning's "Reply To The Government's Opposition . . . And Amended Motion," filed June 27, 1997, he claims that his appellate counsel provided ineffective assistance of counsel by failing to raise several additional objections to the Court's CCE instruction. On July 27, 1997, Petitioner moved to amend his petition to include all claims raised by his co-defendant James H. Holiday, whose petition was also pending before this Court. In 1998, Petitioner filed a third motion to amend to assert a claim based on 18 U.S.C. section 201(c)(2), alleging that the government had violated that provision by offering Nei Wells leniency and then calling her to testify at trial. Finally, on July 23, 1999, Browning moved to amend his petition to include a claim based on the new holding by the Supreme Court in *Richardson v. United States*, 119 S.Ct. 1707, 1709 (1999).

III. Discussion

A. Claims Raised In Browning's Initial Petition

1. Browning's § 846 Conviction and Sentence Is Vacated Contingent Upon The Survival of His § 848 Conviction.

Browning is correct that the Double Jeopardy Clause prohibits cumulative sentences on convictions under 18 U.S.C. § 846 and 18 U.S.C. § 848 where the underlying conduct forming the basis of the conspiracy and CCE charges

is the same. *See Rutledge v. United States*, 517 U.S. 292, 307 (1996) ("A guilty verdict on a § 848 charge necessarily includes a finding that the defendant also participated in a conspiracy violative of § 846; conspiracy is therefore a lesser included offense of CCE. [. . .] Accordingly, '[o]ne of [petitioner's] convictions, as well as its concurrent sentence, is unauthorized punishment for a separate offense and must be vacated.'") (internal citation omitted); *United States v. Medina*, 940 F.2d 1247, 1253 (9th Cir. 1991). Therefore, the Court vacates Browning's conviction and sentence under section 846 (Count 1) on the condition that his conviction and sentence on Count 1 shall be reinstated should Browning be successful in having his CCE conviction and sentence vacated (Count 44). *See Medina*, 940 F.2d at 1253 (approving this procedure).

2. Petitioner's Claim That The Court Erred In Failing To Sua Sponte Instruct That The Jury Could Not Consider Customers Or Suppliers As Supervisees Is Procedurally Barred

In 1995, the Ninth Circuit held that where the government presents individuals to the jury as potential supervisees who do not fit the legal definition of supervisees provided in *United States v. Delgado*, 4 F.3d 780 (9th Cir. 1993), the trial court must instruct the jury that mere customers or suppliers, over whom the defendant did not exercise control, cannot be considered supervisees. *See United States v. Barona*, 56 F.3d 1087, 1096-97 (9th Cir. 1995).

Under Federal Rule of Criminal Procedure 30, Browning was required to raise this objection before the jury retired to consider its verdict. Browning, however, did not raise this

objection to the jury instruction at trial or on appeal. Therefore, he must demonstrate cause excusing his procedural default and actual prejudice resulting from the alleged error. *See United States v. English*, 42 F.3d 473, 477 (9th Cir. 1994) (explaining that Federal Rule of Criminal Procedure 30 requires a party to raise any objections to jury instructions before the jury retires and failure to raise objection constitutes procedural bar to review in collateral proceeding).

Browning does not explicitly argue that he had cause for failing to raise this claim at trial. The only argument he might be making in this regard is that his advisory counsel at trial was ineffective for not raising this issue. *See* Movant's Reply to Government's Opposition to Browning's Motion Pursuant to Title 28 section 2255 and Amended Motion at 14-15 (filed June 27, 1997). As the Court explained in its May 10, 2000 order, there is no constitutional right to advisory counsel where a defendant has chosen to represent himself. Therefore, ineffective assistance of advisory counsel if not a viable theory.

Even assuming that Browning could establish cause for his procedural default, he has not established actual prejudice. "The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of the [trial] court's judgment is even greater than the showing required to establish plain error on direct appeal." *United States v. Frady*, 456 U.S. 152, 166 (*citing Henderson v. Kibbe*, 431 U.S. 145, 154 (1977).[1/] In

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1 While the Court recognizes that Barona strongly states that failure to give this instruction is plain error on direct appeal, it notes that *Barona* does not address the heightened prejudice standard applicable to habeas petitions. Therefore, Browning must still demonstrate prejudice under *Frady*. The

order to establish prejudice under this standard, the question is "whether the ailing instruction by itself so prejudiced the entire trial that the resulting conviction violated due process," not merely whether "the instruction is undesirable, erroneous, or even universally condemned." *Id.* at 169. The instruction must be viewed in the context of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction.'" *Id.* at 169. Under this standard, Browning "must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 170.

Because the jury would undoubtedly have returned the same verdict if the requested instruction had been given, the Court concludes that Browning has not established prejudice. The Government's indictment explicitly listed and the Government argued at trial 15 potential supervisees: Rodney Browning, Nei Wells, Gregory Washington, James Carpenter, Terri Justin, John Milan, Carolyn Henderson, Bridgette Bradford, Steven Bragg, Kimberly Gilmer, James Jenkins, Rodney Nelson a.k.a. Sky, Gregory Hughes, Louis Cunningham a.k.a. L.C., and Rachel. *See* Fourth Superseding Indictment, Exhibit 1 to Government's May 12, 1997

Court also notes that, albeit in an unpublished decision, the Ninth Circuit has found at least one circumstance where failure to give this instruction under the triggering circumstances was not plain error. *United States v. Broomfield*, 161 F.3d 15, 1998 U.S. App. LEXIS 33032 (9th Cir. 1998).

Opposition to Motion to Vacate. The evidence overwhelmingly supports the conclusion that Browning exercised managerial authority over every supervisee named in the indictment. In fact, the only individual named to the indictment that Browning argues could not have been considered a supervisee is Rodney Browning. However, John Milan's testimony clearly provided a sufficient basis to conclude that Elrader Browning supervised Rodney Browning:

Q. Do you know who Rodney Browning is?
A. Yes.
Q. Who is that?
A. Ray Browning's Brother?
Q. Did he have any involvement in the organization?
A. Yes.
Q. What did he do?
A. He ran the Pasadena area.
Q. What do you mean when you say "he ran it"?
A. Distributed drugs in the Pasadena area.
Q. Did Rodney Browning have any supervisor in the organization?
A. Ray Browning.
Q. Did Rodney Browning do anything for Ray Browning except distribute drugs in the Pasadena area?
A.. Whatever other business Ray would tell him to do . . .
Q. And, in general terms, what did Ray Browning direct Rodney Browning to do, except deal drugs?
A. Just run the Pasadena area and act as an enforcer.
Q. What do you mean by "enforcer"?

A. Well, some situation came up where a guy that worked with us by the name of Baker got killed and so we had orders to find Capone.

. . .

Court: Who was Capone, by the way?

A. Capone was a person we thought that had killed James Baker.

Q. And did Mr. Browning give any direction to you and Rodney Browning regarding what he wanted done?

A. He didn't give me a direct order, but Rodney told me that he wanted us to deal with it.

Q. What do you mean by that?

A. Kill him.

See Reporter's Transcript of Proceedings, *United States v. Elrader Browning, Jr., et al.*, No. CR 87-571(D)-SVW, on June 3, 1988 ("RT 6/3/88"), at 4-8.

Petitioner further argues, however, that the language of the indictment gave rise to the need for a *Barona* instruction.[2/] While the indictment did not limit the individuals that the jury

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2 The Fourth Superceding indictment provided in pertinent part, "[the] offenses were undertaken by defendant Elrader Browning, Jr., in concert with five or more persons with respect to whom defendant Elrader Browning, Jr., occupied a position of organizer, supervisor, and manager, which persons included, but were not limited to, Rodney Browning, ..."

could consider as supervisees,[3/] it only presented as potential supervisees those individuals that the evidence strongly suggested were supervised by Browning. *Barona* requires the instruction only where the jury was presented with individuals among the list of potential supervisees who could not have legally qualified as supervisees given the evidence introduced at trial. 56 F.3d at 1097. The uncontradicted evidence overwhelmingly supported a finding that all of the individuals argued were, in fact, supervisees. Under these circumstances, Browning has not "shoulder[ed] the burden of showing" that the instructional error "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 170. Therefore, his claim must be denied.

3. Browning's Claim That The Court Erred In Failing To Instruct The Jury That It Must Unanimously Agree On The Five Supervisees Fails

This claim fails both because it is procedurally barred and on the merits.

a. Possible Procedural Default

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3 As the government correctly notes, the language of the indictment is not essential to the Government's CCE case. The Government need not name those it will allege as supervisees in the indictment or bill of particulars unless there is a specific showing of surprise or prejudice in not doing so. *United States v. Zanzucchi*, 892 F.2d 56, 58 (9th Cir. 1989), *cited in* Government's Response to Court's March 14, 2001 Minute Order Seeking Clarification of Government's Position Regarding Two Issues in Government's Opposition to Defendant's Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, at 3-4 (filed Mar. 16, 2001). No such specific showing has been made here.

As discussed above, Browning represented himself at trial. Prior to instructing the jury, the Court discussed the propriety of the government's proposed jury instructions with both parties. Browning objected to the government's proposed CCE instruction, requesting that the jury be required to agree unanimously on at least five people that Browning supervised and that the jury specifically name those people.

The Court rejected Browning's request after the Assistant United States Attorney represented that there was no Ninth Circuit case law supporting such an instruction and that other circuits that had addressed the issue had rejected the requested instruction. After Browning was convicted, he hired counsel to represent him on appeal. While Browning's appellate counsel raised several issues on appeal, he did not object to the Court's CCE instruction. The Government contends that Browning has procedurally defaulted this claim by failing to raise it on appeal.

It is not entirely clear whether failure to raise an issue on direct appeal constitutes a procedural default that precludes raising a claim in a section 2255 petition absent a showing of cause and prejudice. In 1993, the Ninth Circuit held that "if a criminal defendant could have raised a claim of error on direct appeal but nonetheless failed to do so, he must demonstrate both cause excusing his procedural default, and actual prejudice resulting form the claim of error." *United States v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993). The following year, the Ninth Circuit decided *English v. United States*, 42 F.3d 473 (9th Cir. 1994), holding that a defendant may raise a constitutional claim in a section 2255 petition regardless of whether the issue was raised on direct appeal "unless the defendant deliberately bypassed prior opportunities to raise the claim." *Id.* at 478. Under *English*,

"[I]t is the violation of a [] procedural rule, and not the mere failure to raise a claim, that triggers the procedural default doctrine." *Id.* at 478. "Unless the defendant has violated some rule which required him to raise a claim or forfeit it, there is no procedural default, and the cause and prejudice standard does not apply." *Id.*

In a powerful concurrence, Judge Browning wrote that "[o]ur circuit has already interpreted *Frady* as requiring defendants who fail to seek review of an issue on appeal in direct proceedings to show cause and prejudice for that default in order to pursue collateral relief, without regard to whether they also violated an express waiver provision." *Id.* at 484. Judge Browning also rejected the majority's attempt to fit the court's prior case law into the new rule. *Id.* at 485.

The *English* decision has been further undercut, if not implicitly overruled by the recent Supreme Court decision in *Bousely v. United States*, 523 U.S. 614 (1998).[4/] Bousley pled guilty to "use" of a firearm prior to the Supreme Court's decision in *Bailey v. United States*, 516 U.S. 137, 144 (1995), which held that "use" requires "active employment of the firearm." At the time of Bousley's plea, the prevailing view among the courts was that possession was sufficient to

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4 The Court also notes that a number of other circuits have held that a claim is procedurally defaulted if it is not raised on direct appeal. *See, e.g., Campino v. United States*, 968 F.3d 187 (2d Cir. 1992); *Ludwig v. United States*, 162 F.3d 456, 458 (6th Cir. 1998) (holding that *Bousley* mandates a procedural default if there is no finding of cause and prejudice where a petitioner has failed to raise a claim on direct appeal); *Dawson v. United States*, 77 F.3d 180, 183 (7th Cir. 1996).

constitute "use" of a firearm. Bousley was informed of this by both the sentencing court and his attorney. Bousley later appealed his sentence, but did not challenge the validity of his plea. Subsequently, Bousley brought a section 2241 petition, construed as a section 2255 petition, that (eventually) included a claim that his plea was involuntary because he was misinformed of the true nature of offense with which he was charged, as that offense was defined by Bailey.

The Supreme Court found that Bousley had procedurally defaulted the claim by failing to raise it on direct review, holding that "even the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review. Habeas review is an extraordinary remedy and "'will not be allowed to do service for an appeal.'" *Id.* at 620 (quoting *Reed v. Farley*, 512 U.S. 339 (1994)). The Court further explained that "[w]here a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice' or that his 'actually innocent.'" *Id.* at 622 (internal citations omitted) (emphasis added). The Supreme Court found that Bousley's *Bailey* claim was procedurally defaulted simply because he failed to raise it on direct review – not because he violated any explicit procedural rule.

The Ninth Circuit has not yet addressed the impact of *Bousley* on its prior decision in *English*, it will follow the *English* decision out of an abundance of caution. Nonetheless, the Court will also address the issues of cause and prejudice.

Browning contends that he had cause for failing to raise objections to the Court's jury instructions on direct appeal

because (1) his argument would have been futile before *United States v. Jerome*, 942 F.2d 1328, 1331 (9th Cir. 1991), and (2) his appellate counsel provided ineffective assistance of counsel by failing to raise the issue.

(i) Futility Does Not Establish Cause

Petitioner claims that he has cause for failing to raise this objection on appeal because, at the time, there existed a solid wall of precedent holding that no specific unanimity instruction need to given.

In *People v. Isaac*, 456 U.S. 107 (1982), a state prisoner brought a federal habeas corpus petition contending that the trial court had deprived him of due process by submitting faulty instructions to the jury. For example, defendant argued that the trial court's jury instructions improperly placed the burden on him to prove that he acted in self defense. Defendant argued that it would have been futile to raise an objection to the instructions at the time of trial because the state of Ohio had "long required criminal defendants to bear the burden of proving this affirmative defense." *Id.* at 130. The Supreme Court rejected defendant's argument stating that "the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial." *Id.* At the time that *Engle* was decided, it appears that most courts applied the holding only to state prisoners. However, the Supreme Court's 1998 decision in *Bousley* (discussed above) extended this rule to federal prisoners.

The petitioner in *Bousley* offered two explanations for his failure to raise his *Bailey* claim on direct appeal: (1) "the legal basis for the claim was not reasonable available" at the time

of his guilty plea, and (2) that "before *Bailey*, any attempt to attack [his] guilty plea would have been futile." *Id.* at 1604. The Supreme Court rejected both explanations. While the Court accepted the notion that a claim could be so novel as to constitute cause, the Court concluded that Bousley's claim regarding the elements of section 924(c)(1) was not novel as it had been raised in many courts (and rejected). *See, e.g., United States v. Cooper*, 942 F.2d 1200, 1206 (7th Cir. 1991). The Court then rejected Bousley's futility argument in a sentence, citing *Engle* for the proposition that "futility cannot constitute cause if it simply means that a claim was 'unacceptable to that particular court at that particular time.'" *Bousley*, 523 U.S. at 622 (citing *Engle*, 456 U.S. at 130).

Therefore, Browning's futility argument must fail. In any case, Browning could not establish futility given that at the time of his trial and appeal, neither the Ninth Circuit or Supreme Court had ever rejected his claim regarding the CCE instruction.

(ii) Browning's Appellate Counsel Was Not Ineffective For Failing To Challenge The CCE Instruction on Appeal

An appellant claiming ineffective assistance of counsel must prove (1) that the lawyer's performance was deficient, and (2) that the deficient performance was prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 684-87 (1984). To establish deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. However, a showing of error does not alone support a finding of ineffective assistance of counsel. "Any deficiencies in counsel's performance must be

prejudicial to the defense in order to constitute ineffective assistance of counsel under the Constitution." *Id.* at 692. That is, "[t]here must be a reasonable probability, sufficient to undermine confidence in the outcome, that the result of the proceeding would have been different but for counsel's errors." *Smith v. Stewart*, 189 F.3d 1004, 1008 (ith Cir. 1999).

There is a strong presumption that a lawyer's performance fell "within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. The Supreme Court explained:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is too easy for a court, examining counsel's defense after it proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Id.

The Ninth Circuit Court of Appeals rejected Browning's appeal on August 6, 1990. Therefore, in determining whether Browning's appellate counsel provided ineffective assistance of counsel, the Court must review counsel's performance in light of the law at the time of petitioner's appeal in 1990.

At that time, the courts that had addressed the question of whether jurors had to agree on the identity of the five supervisees in order to convict Browning under section 848 had uniformly rejected the proposition. *See United States v. Lin*, 889 F.2d 1368, 1374 (5th Cir. 1989); *United States v. Jackson*, 879 F.2d 85, 88 (3d Cir. 1989) *United States v. Tarvers*, 833 F.2d 1068, 1073 (1st Cir. 1987); *United States v. Markowski*, 772 F.2d 358, 364 (7th Cir. 1985); *United States v. Smith*, 919 F.2d 1501, 1513 (11th Cir. 1990). While it would have been the better practice for Browning's counsel to raise the error on appeal, his representation was not ineffective; he had no duty to raise arguments not supported by law.

b. The Court Was Not Required To Give The Requested Unanimity Instruction

Since the Court was not required to give the instruction, Petitioner both loses on the merits and would be unable to demonstrate prejudice if he were procedurally defaulted.

In order to be convicted of a continuing criminal enterprise, a defendant must occupy "a position of organizer, a supervisory position, or any other position of management" over five or more people. 21 U.S.C. section 848(c). In *United States v. Jerome*, 942 F.2d 1328 (9th Cir. 1991), the Ninth Circuit held that where the government argues that a defendant was an organizer of various individuals and one or more of the individuals argued by the government could have legally qualified under section 848(c), the court must instruct the jury that they must unanimously agree on "the identity of each of the five people organized by . . . [the defendant]". *Id.* at 1330. The requirement for this instruction is only triggered where the government argues that some particular person

could qualify as one of the five section 848(c) organizees or supervisees. *Jerome*, 942 F.2d at 1330-31 ("The jury in this case was presented with a variety of persons that the prosecution told them could count in making up the five persons necessary to trigger the statute. However, some of the people named by the prosecution could not have been organized by Jerome.") *See also United States v. LeMaux*, 994 F.2d 684, 688-89 (9th Cir. 1993); *United States v. Garcia*, 998 F.2d 965, 969 (9th Cir. 1993).

Here the government argued that fifteen peo0ple were organized by Elrader Browning: Rodney Browning, Nei Wells, Gregory Washington, James Carpenter, Terri Justin, John Milan, Carolyn Henderson, Bridgette Bradford, Steven Bragg, Kimberly Gilmer, James Jenkins, Rodney Nelson aka Sky, Gregory Hughes, Louis Cunningham aka L.C., and Rachel. As discussed above, there was evidence supporting a finding that each of these people was managed by Browning. Therefore, the need for the unanimity instruction was not triggered.

B. Claims Raised In Petitioner's Reply To Government's Opposition to Motion to Vacate and Amended Motion

1. Motion to Amend is Denied Because Amendment Would Be Futile

Petitioner's amendment raising the claims discussed in this section was filed after the one year statute of limitations for bringing habeas petitions had run. Thus, petitioner is only able to raise these claims if his proposed amendments fall into the exception provided for in Federal Rule of Civil Procedure 15(c)(2); the amendments must relate back to the original

petition because they "arose out of the conduct, transaction, or occurrence set forth . . . in the original petition." Fed. R. Civ. Pro. 15(c)(2).

An amendment can "relate-back" when the amendment seeks merely to amplify the facts supporting a claim but not when it adds a new claim or theory:

> an untimely amendment to a section 2255 motion 'which, by way of additional facts, clarifies or amplifies a claim or theory in the [original petition] may, in the District Court's discretion, relate back to the date of [the original petition] if and only if the [original motion] was timely filed and the proposed amendment does not seek to add a new claim or to insert a new theory into the case.

United States v. Espinoza-Saenz, 235 F.3d 501, 505 (10th Cir. 2000) (quoting *United States v. Thomas*, 221 F.3d 430 (3d Cir. 2000).

Several circuits have now addressed the issue of when an amendment presents a new claim or theory rather than factual amplification.[5/] *United States v. Duffus*, 174 F.3d 333 (3d Cir. 1999); *United States v. Thomas*, 221 F.3d 430 (3d Cir. 2000); *United States v. Pittman*, 209 F.3d 314 (4th Cir. 2000); *United States v. Craycraft*, 167 F.3d 451 (8th Cir. 1999); *United States v. Espinoza-Saenz*, 235 F.3d 501 (10th Cir. 2000); *Davenport v. United States*, 217 F.3d 1341 (11th Cir. 2000).

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5 Though the Ninth Circuit has not addressed this issue, it did cite *Craycraft*, *Pittman*, and *Davenport* with approval in a section 2254 case. *Anthony v. Cambra*, 236 F.3d 568, 577 (9th Cir. 2000).

It is quite clear that an amendment alleging ineffective assistance for counsel's failure to raise certain issues, when those issues were not even raised as substantive issues in the original petition, fails the relation-back test. *See, e.g., Davenport*, 217 F.3d at 1346; *Craycraft*, 167 F.3d at 457.

Even where the underlying claim was raised in the original petition, however, a claim of ineffective assistance for failing to raise the trial error on direct appeal does not relate back to the original petition. A claim of ineffective assistance for failing to raise any claims at all does not relate back where some trial errors that might have been raised on appeal were contained in the original habeas petition. *Pittman*, 209 F.3d at 316-18. There is no difference as far as the novelty of the claim or theory between ineffective assistance for failure to appeal and ineffective assistance for failure to appeal specific issues. Moreover, as with *Pittman*, there is no relation-back of ineffective assistance for failure raise an issue to a claim based on the substantive issue that counsel failed raise itself. Failure of counsel to raise a specific issue on appeal is distinct in time and factual background from a trial court error in ruling on the issue that appellate counsel failed to raise.

Petitioner's second proposed amendment is a somewhat amorphous claim but seems to be that appellate counsel was ineffective in failing to raise on direct appeal the third claim in his original petition (*Barona* claim). Again, amendment two does not relate back because ineffective assistance for failure to raise a issue on appeal is a distinct claim from assertion of the issue itself. Petitioner's first, third, fourth, fifth and sixth amendments allege ineffective assistance for failure to raise claims on direct appeal that were not a part of

his original petition. These do not relate back under *Davenport* and *Craycraft*.

2. Claims of Alleged Ineffective Assistance Are Without Merit and Were Harmless.

In Browning's Reply to the Government's Opposition to his initial section 2255 motion, Browning raised an additional claim of ineffective assistance of appellate counsel. Browning conceded that his appellate counsel should have argued that the district court erred by failing to instruct the jury as to certain required elements, as follows:

A conspiracy between the various participants in the enterprise is required to establish a CCE.

There was no adequate explanation of the relationship required between Browning and the other five individuals to establish a CCE.

The instructions did not adequately explain the "series" requirement.

The instructions did not adequately explain the "enterprise" requirement.

The Court erroneously allowed the jury to consider the conspiracy offense as one of the three predicate felony violations

The Court erred by replacing the "in concert" language with "together."

See Petitioner's Reply . . . and Amended Motion at 17.

Since these alleged errors were not raised at trial, the Court of Appeals would have reviewed them for plain error. None of the alleged errors claimed by petitioner were in fact error, much less plain error, so Browning's appellate counsel did not provide ineffective assistance of counsel by declining to raise them on appeal.

a. Appellate Counsel Was Not Ineffective For Failing to Argue that the Court Committed Plain Error By Not Instructing the Jury That a Conspiracy Among the Various Participants in the "Enterprise" Was Required

Browning argues that his appellate attorney provided ineffective assistance of counsel by failing to argue that the Court committed plain error in not instructing the jury sua sponte that the five or more supervisees in Browning's CCE had to have conspired with each other and had to have been jointly involved in at least three predicate federal narcotics trafficking violations with Browning. Both of these contentions are simply incorrect.

The five or more supervisees need not have acted in concert with each other and need not have been involved with the Browning at the same time. *See United States v. Baker*, 10 F.3d 1374, 1409 n. 17 (9th Cir. 1993); *United States v. Jerome*, 942 F.2d 1328, 1330 (9th Cir. 1991). It is also clear that the five or more supervisees need not have been involved in any single criminal transaction. *United States v. Burt*, 765 F.2d 1364, 1366 (9th Cir. 1985). Thus, the Court did not err in failing to give these additional instructions and appellate

counsel was not ineffective in failing to argue that Court did so err.

b. Appellate Counsel Was Not Ineffective For Failing to Argue that the Court Committed Plain Error By Not Instructing the Jury As To The Requisite Relationship Among The Five Individuals

While the captioning of this claim is somewhat elusive, Petitioner seems to be alleging that his appellate counsel was ineffective in failing to raise the necessity of a *Barona* instruction on direct appeal. As discussed above, Petitioner's claim that a *Barona* instruction was required in this case lacks merit. Therefore, counsel was not ineffective for failing to raise this claim on direct appeal.

c. Appellate Counsel Was Not Ineffective For Declining to Argue that the Court Committed Plain Error By Failing to Explain the "Series" Requirement

The jury was instructed as follows with respect to the series element of 21 U.S.C. section 848: "The offenses were part of three or more offenses committed by defendant Browning over a definite period of time in violation of the federal narcotics laws which make it a crime to possess with intent to distribute or to distribute controlled substances." RT 6/9/88: 47-48.

Petitioner is incorrect in his contention that this instruction inadequately explains the series requirement. This instruction nearly parallels the Ninth Circuit pattern instruction on this element of the crime.[6] The only different is that the word "series" is used in the pattern instruction but not in the instruction in this case. The Ninth Circuit has however defined "series" in this context as consisting of three or more federal narcotics law violations as is noted in the comment to the pattern instruction. *United States v. Baker*, 10 F.3d 1374, 1406 (9th Cir. 1993), *cert. denied*, 513 U.S. 934 (1994). Since the court correctly instructed the jury of the substance of what is must find for the series element of the crime, there was no error in the instruction given. The Court is under no obligation to use any particular language offered by a party as long as the instruction given adequately explains the issue before the jury. *Maddox v. City of Los Angeles*, 792 F.2d 1408, 1416 (9th Cir. 1986); *Mitchell v. Keith*, 752 F.2d 385, 389 (9th Cir. 1985). Though the Court recognizes that other circuits give variants of this instruction, it further notes, first, that the instruction given is appropriate under Ninth Circuit law and, secondly, that at least one other circuit has upheld an instruction essentially equivalent to that given in the present case.[7]

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6 ". . . the offense[s] [was] [were] part of a series of three or more offensees committed by the defendant over a definite period of time." Ins. 9.26.

7 The First Circuit upheld such an instruction in *United States v. Catano*, 66 F.3d 306, 1995 U.S. App. LEXIS 31640 (1st Cir. 1995). The Court recognizes that it can not only rely and does not rely on this unpublished decision though it has found the similarities between the instructions interesting.

d. Appellate Counsel Was Not Ineffective For Declining to Argue that the Court Committed Plain Error By Failing to Explain the Purported "Enterprises" Requirement

There is no authority to support Browning's argument that the Court was required to define "enterprise" for the jury. While section 848 is entitled "Continuing Criminal Enterprise", it does not now, and did not in 1987, establish "enterprise" as an element of the offense. The statute instead defines engaging in a continuing criminal enterprise as consisting of the elements set forth in the statute. *See* 21 U.S.C. section 848(d) (1987).

The D.C. Circuit indirectly dealt with this issue under rather off circumstances. In *United States v. Williams-Davis*, 90 F.3d 490 (D.C. Cir. 1996), a juror had looked up the term "enterprise" in a dictionary, allegedly to persuade other jurors to convict on the CCE charge. *Id.* at 279. The district court found that the use of the dictionary was not prejudicial because "the [CCE] statute uses the term [enterprise] only in labelling the crime, not in identifying any of the criteria that must be satisfied to show the crime's commission." *Id.* The Court of Appeals agreed, holding that "[t]he word looked up had no legal relevance to the findings necessary for the charges on which the jury convicted . . . ." *Id.* at 280.

The instruction given in *Catano* is as follows: ". . . these offenses were part of three or more offenses committed by Mr. Jaime Catano over a definite period of time in violation of the federal narcotics law . . ." *Id.* at *17, n.3.

Because the finding of an "enterprise" is not an element of a CCE violation, the Court did not err by failing to explain it and Browning's appellate counsel certainly did not commit error by failing to make such an argument on appeal.

e. Appellate Counsel Was Not Ineffective For Declining to Argue that the Court Committed Plain Error By Allowing the Jury to Consider the Conspiracy Offense As A Predicate Offense

Browning is correct that the Court allowed the jury to consider the conspiracy offense as one of the three predicate offenses making up the continuing series of violation. However, Ninth Circuit law expressly permits such an offense to constitute one of the three required predicate offenses required to find a CCE violation. *See United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1571 (9th Cir. 1989). Moreover, the jury convicted petitioner of a great number of other predicate drug trafficking offenses. Thus, even if the Court had instructed the jury not to consider the conspiracy charge as a potential predicate offense, it would have made no difference in the jury's verdict on the CCE charge.

f. Appellate Counsel Was Not Ineffective For Failing to Argue that the Court Committed Plain Error By Instructing the Jury that Browning Had to Commit Three or More Offenses "Together with" (Rather Than

"In Concert With") Five Or More Persons

The Court instructed the jury that it must find that "defendant Browning committed the offenses together with five or more other persons." Browning argues that his appellate attorney provided ineffective assistance of counsel by failing to argue that this Court committed plain error by substituting "together with" for the "in concert" language used in the statute. This argument is frivolous. "In concert" means "together". *See* Webster's Third New International Dictionary 470 (1966). Moreover, even if "in concert" might have been a better choice, Browning's appellate attorney surely did not provide ineffective assistance by failing to raise this argument on appeal. As discussed above, a defendant is not entitled to his chosen wording in jury instructions as long as the instruction adequately explains the issue before the jury. *Maddox*, 792 F.2d at 1416; *Mitchell*, 752 F.2d at 389.

C. Petitioner's Motion To Amend To Include Claims Raised By Codefendant Holiday is Denied

Defendant Holiday made the following eight claims in his section 2255 petition:

Holiday argued that he was denied effective assistance of counsel when his appellate attorney failed to argue that Agent Bareng's reckless or intentional omission of facts from his wiretap affidavit violated *Franks v. Delaware*, 438 U.S. 154 (1978), and justified reopening of the wiretap suppression motion.

Holiday argued that the Court should have disqualified AUSA Gordon from acting as a government co-counsel because of the possibility that he would be called to testify at trial.

Holiday argued that the government's failure to produce the report of an interview with witness Carl Lewis before trial constituted a Brady violation.

Holiday was convicted on Counts 27 and 29 for possession of with intent to distribute cocaine on May 8 and May 21, 1987. The jury was unable to reach a verdict on Count 1, the conspiracy charge, and Count 30, the charge of possessing with intent to distribute cocaine on May 22, 1987. Browning argued that the jury verdicts were inconsistent and the product of confusion. He moved to vacate his sentence on the ground that he was denied effective assistance of counsel when his attorney failed to raise this issue on appeal.

Holiday claimed that the government failed to prove at sentencing a sufficient type and quantity of cocaine to allow a life sentence on either Count 27 or Count 29.

Holiday argued that the Court erred in sentencing him under the enhanced penalty provisions of 21 U.S.C. section 841(b) that were added by the Narcotics Penalties and Enforcement Act of 1986.

Holiday argued that his appellate counsel provided ineffective assistance of counsel by failing to argue that the Court deprived him of his Sixth Amendment right to effective assistance of counsel when it allowed petitioner to represent himself.

Holiday argued that his appellate attorney provided ineffective assistance of counsel by failing to argue that the cocaine base/cocaine powder distinction in 21 U.S.C. section 841(b) violates the Equal Protection Clause.

See Attached Order Denying Holiday's Motion to Vacate.

As an initial matter, the Court does not believe that a petitioner can simply make a motion to incorporate voluminous claims made by a co-defendant without even tailoring the claims to his own situation. As can easily be seen, some of the claims made by Holiday could not possibly apply to Browning – such as claims four through six. Second, all of these claims are time-barred, as they were filed after the statute of limitations period had run and do not relate back to Browning's timely filed claims. Therefore, allowing this amendment would be futile. See infra Sec. (D)(1). Lastly, even if the Court did allow the amendment, all of the claims raised are without merit. *See* Attached Order of January 20, 2000 Denying Holiday's Motion to Vacate. For all these reasons, the Court will not allow the proposed amendment.

D. Petitioner's Motion to Amend To Add § 201(c)(2) Claim Is Denied

1. The Proposed Amendment Would Be Futile

Browning claims that the Government violated 18 U.S.C. § 201(c)(2) by offering Nei Wells leniency in exchange for her testimony at trial. Section 201(c)(2) prohibits giving or offering "anything of value to any person for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial . . . ."

Browning did not raise this claim in his original petition, but instead filed a motion to amend to include this claim in 1998. Courts generally apply Federal Rule of Civil Procedure 15 in deciding whether to allow a motion to amend a section 2255 petition. *See, e.g., United States v. Pittman*, 209 F.3d 314, 317 (5th Cir. 2000); *Rogers v. United States*, 180 F.3d 349, 352 n.3 (1st Cir. 1999); *United States v. Duffus*, 174 F.3d 333, 336 (3d Cir. 1999). Rule 15(a) provides that "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . . Otherwise a party may amend the party's pleading only by leave of the court or by written consent of the adverse party . . . ." Leave to amend shall be freely given absent bad faith, undue prejudice to the opposing party, or futility of amendment. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). Where a claim raised in a motion to amend a section 2255 is time-barred by the statute of limitations, the proposed amendment should be denied as futile. *See Pittman*, 209 F.3d at 317; *United States v. Duffus*, 174 F.3d 333, 336-37 (3d Cir. 1999); *United States v. Craycraft*, 167 F.3d 451, 457 (8th Cir. 1999).

Petitioner had until April 23, 1997 to file a section 2255 petition. His motion to amend to add the section 201(c)(2) claim was not filed until 1998. Therefore, petitioner's section 201(c)(2) claim is barred by the statute of limitations. Under Federal Rule of Civil Procedure 15(c), claims in a proposed amendment that are barred by the statute of limitations may be heard where they "relate back" to the original pleadings. A new claim is considered to relate back where it "arose out of the conduct, transaction, or occurrence set forth . . . in the original petition." Fed. R. Civ. Pro. 15(c)(2).

Browning's original petition stated three claims: (1) that his cumulative sentences under 21 U.S.C. § 846 and 21 U.S.C. § 848 violated the Double Jeopardy Clause; (2) that the Court erred in failing to instruct the jury that it must unanimously agree on the five people petitioner supervised to convict on the CCE count; and (3) that the Court erred in failing to instruct that the jury could consider as supervisees only those persons over whom Browning exercised managerial authority. Browning's claim under § 201(c)(2) does not relate to any of the claims raised in his initial petition. Therefore, this claim is time-barred and it would be futile to allow the proposed amendment.

2. Petitioner Did Not Raise His 201(c)(2) Claim Either at Trial or on Direct Review

Petitioner never objected to the admission of Nei Wells' testimony either at trial or on direct appeal. Thus, the Court may be precluded from entertaining this claim. *See supra* Sec. III(A)(3)(a). The government has not alleged that petitioner violated a procedural rule in failing to raise this claim on an earlier occasion and the Court has found no such rule. *See English*, 42 F.3d at 478.

If Petitioner were procedurally defaulted, however, Petitioner could not demonstrate cause for his failure to raise this claim earlier because nothing prevented him from making this claim at trial or on appeal. The pertinent provision of 18 U.S.C. section 201(c)(2) has been the same since the time of Browning's arrest in 1987 as it is today. While two circuit courts and one district court had rejected Petitioner's claim under 18 U.S.C. section 201(c)(2) claim at the time he was tried and convicted, *see United States v. Barrett*, 505 F.2d

1091 (7th Cir. 1974); *United States v. Blanton*, 700 F.2d 298, 310-11 (6th Cir.), *reh'g on other ground*, 719 F.2d 815 (1983), *United States v. Isaacs*, 347 F.Supp. 763 (N.D. Ill. 1972), there existed no binding precedent precluding Petitioner from raising his objection to the admission of Wells' testimony. Thus, Petitioner's argument that a "solid wall" of precedent foreclosing such an the objection, the Court would be unable to consider such a futility argument as "cause." *See* Supra at Section III(A)(2) (discussing *Bousley*).

3. Browning's § 201(c)(2) Claim Also Fails On The Merits

Petitioner's § 201(c)(2) claim is also entirely without merit. Petitioner relies upon *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998) to support his argument that the government violated 18 U.S.C. section 201(c)(2) by entering into a cooperation agreement with Nei Wells and then calling her as a witness at trial. The Tenth Circuit has since vacated its ruling in *Singleton* and agreed with every other circuit to have addressed the question that section 201(c)(2) does not apply to the United States or its attorneys. *See United States v. Singleton*, 165 F.3d 1297, 1301 (10th Cir. 1999) (en banc). *See also United States v. Ramsey*, 165 F.3d 980, 987 (D.C. Cir. 1999)("[S]ection 201(c)(2) does not prohibit the Government from granting leniency in exchange for truthful testimony."), *United States v. Johnson*, 169 F.3d 1092, 1097-98 (8th Cir. 1999) (same), *United States v. Lowery*, 166 F.3d 1119, 1122-24 (11th Cir. 1999) (same), *United States v. Ware*, 161 F.3d 414, 418-24 (6th Cir. 1998) (same), *United States v. Haese*, 162 F.3d 359, 367-68 (5th Cir. 1998). Moreover, the Ninth Circuit has conclusively rejected Petitioner's argument. *See United States v. Mattarolo*, 209 F.3d 1153, 1160 (9th Cir.

2000). Therefore, Petitioner's objection to the admission of Wells' testimony is entirely without merit.

E. Petitioner's *Richardson* Claim Is Without Merit Because Any Alleged Error Was Harmless

Petitioner contends that he was denied due process because the Court failed to instruct the jury that it must unanimously agree on at least three of the predicate offenses alleged in Count 44 of the indictment to constitute the continuing series of federal drug trafficking violations required by the statute. Petitioner relies on *Richardson v. United States*, 119 U.S. 1707 (1999), which held that, in a case alleging a CCE under 21 U.S.C. § 848, the jury must be instructed that it must unanimously agree on the specific violations that make up the "continuing series of violations."

Browning did not raise this claim at trial or on direct appeal. As with Petitioner's *Barona* claim, Federal Rules of Criminal Procedure 30 requires Browning to have raised this objection before the jury retired to consider its verdict. *See English*, 42 F.3d at 477. Therefore the claim is procedurally barred unless Petitioner can prove cause for his failure and prejudice therefrom. Browning contends that cause is established because his appellate counsel was ineffective in failing to raise the issue on appeal. Browning, however, did not make this argument at trial either. Thus, Petitioner has not established cause for his failure to raise this claim.

Even if he could establish adequate cause, Browning cannot demonstrate any prejudice as a result of the fact that the instruction was not given. Any error in the instruction was entirely harmless under the circumstances. *See United*

States v. Hernandez-Escarsega, 886 F.2d 1560, 1572-73 (9th Cir. 1989) (applying harmless error analysis to pre-Richardson challenge to CCE instruction); *Lanier v. United States*, 205 F.3d 958, 964 (7th Cir. 2000) (holding that harmless error analysis applies to Richardson claims); *United States v. Brown*, 202 F.3d 691, 699 (4th Cir. 2000) (same); *Murr v. United States*, 200 F.3d 895, 906 (6th Cir. 2000) (same); *United States v. Escobar de Jesus*, 187 F.3d 148, 162 (1st Cir. 1999) (same). The jury convicted Browning of every predicate offense alleged in Count 44 (the CCE charge) of the indictment: thirty-nine predicate offenses in all. The jury was required to find guilt as to each predicate offense unanimously. Under these circumstances, it is impossible that the jury did not unanimously agree that Petitioner committed at least three violations of federal narcotic laws. In fact, the jury unanimously agreed that Browning committed 39 predicate offenses. Moreover, the evidence overwhelmingly demonstrated that these offenses were related and that they were conducted as part of a widescale drug ring. Therefore, the absence of a specific unanimity instruction regarding the predicate offenses was harmless and Browning's motion to vacate on that ground is denied.

III. Conclusion

The petition for a writ of habeas corpus is DENIED IN PART; the writ is GRANTED only with respect to petitioner's double jeopardy challenge as set forth in Section III(A)(1) above.

IT IS SO ORDERED.

Dated: March 28, 2001 /s/_____

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff,

vs.

ELRADER BROWNING, Defendant.

CV-97-02701-SVW
CR-87-00571(D)-SVW

Entered July 10, 2001

ORDER GRANTING CERTIFICATE OF APPEALABILITY

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

This Court denied Petitioner's 28 U.S.C. § 2255 motion on March 29, 2001. On May 25, 2001 Petitioner filed for a certificate of appealability of this Court's denial of his 28 U.S.C. § 2255 motion. The Government filed a response on June 4, 2001.

Pursuant to 28 U.S.C. § 2253(c)(2), the court hereby grants a certificate of appealability for the following issue:

Petitioner's claim that the Court erred in failing to instruct the jury that it must unanimously agree on the five supervisees.

The Petitioner's request for a certificate of appealability for all of his other claims is DENIED.

IT IS SO ORDERED.

DATED: July 10, 2001

/s/
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 01-56161

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

ELRADER BROWNING, JR., Defendant-Appellant.

D.C. No. CV-97-02701-SVW
Central District of California (Los Angeles)

Entered October 22, 2001

ORDER

Before: REINHARDT and BERZON, Circuit Judges.

The motion to broaden the certificate of appealability is granted with respect to the following issues: (1) whether the district court erred by failing to instruct the jury that it could consider as supervisees only those persons over whom defendant exercised managerial authority; (2) whether the district court erred by refusing to allow petitioner to amend his petition to include claims that his appellate counsel was ineffective for failing to challenge the jury instructions with regard to the CCE charges and to incorporate claims raised by

his codefendant's section 2255 petition; and (3) whether petitioner procedurally defaulted on any of his claims. *See* 28 U.S.C. section 2253(c)(3).

The briefing schedule is set as follows: Petitioned's opening brief and excerpts of record are due December 17, 2001; respondent's answering brief is due January 22, 2002; the optional reply brief is due within 14 days after service of respondent's brief.

APPENDIX F

United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

21 USC § 848

(a) Penalties; forfeitures

(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life

imprisonment, "to a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 413 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of title 18, United States Code, or $ 4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 413 of this title.

(b) Life imprisonment for engaging in continuing criminal enterprise. Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a), if–

(1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and

(2) (A) the violation referred to in subsection (d)(1) involved at least 300 times the quantity of a substance described in subsection 401(b)(1)(B) of this Act, or

(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $ 10 million dollars in gross receipts during any twelve-month period of its

existence for the manufacture, importation, or distribution of a substance described in section 401(b)(1)(B) of this Act.
(d) 'Continuing criminal enterprise' defined

"For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if –

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter --

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(e) Suspension of sentence and probation prohibited.

In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of title 18 and the Act of July 15, 1932 (D. C. Code, secs. 24-203 -- 24-207), shall not apply.

28 USC § 2255

§2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of–

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain–

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.